

DECISION



1886 1 PL-1
Has further
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-200595

DATE: July 20, 1981

MATTER OF: Diesel Parts of Columbus

DIGEST:

1. Advice by protester to contract specialist that protester intended to propose alternate part notwithstanding sole-source restriction in solicitation, coupled with protester's expression of disapproval of restriction, constituted timely oral protest of restriction to agency. Subsequent protest of restriction to GAO is also timely since filed within 10 days of initial adverse agency action on protest.
2. Where protester fails to show that military specification cited is sufficient by itself to permit competitive procurement, given lack of data on part to be purchased on sole-source basis, and where trial installation of protester's part would be needed to determine complete acceptability of part under test criteria which would take several months to develop, protester has not met its burden of affirmatively proving that agency decision to procure final requirement of part on sole-source basis is unreasonable.

Diesel Parts of Columbus (Diesel) protests the sole-source restriction (Morse Instrument Company part No. 44196) placed on the purchase of "vernier throttle control assemblies" under United States Army Tank-Automotive Materiel Readiness Command (TARCOM) request for proposals No. DAAE07-80-R-5295, which established a closing date of September 26, 1980. Based on our review of the record, we deny the protest.

It is the position of the contracting agency that the Diesel protest, which was received by our Office on September 29, 1980, is untimely and not

[Protest of Sole-Source Restriction in Solicitation]
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for consideration. Protests against alleged improprieties in a request for proposals are to be filed prior to the closing date for the receipt of initial proposals, in order to be timely. 4 C.F.R. § 21.2(b)(1) (1981). Although Diesel states that on September 19 it informed Mr. John J. Meisel, contract specialist, that it was protesting the sole-source restriction, this, the agency states, is not true. The agency advises that according to Mr. Meisel, Diesel merely "expressed disapproval" of the sole-source restriction and "indicated that [it] was going to offer an alternate part [instead of the Morse part] notwithstanding the [restriction]." At this time, Diesel, allegedly, did not state that it was actually protesting the restriction, and the first indication to the agency that Diesel intended to protest the matter was the statement--"We protest * * * Letter going to GAO in Washington."--in the Diesel offer. Protests filed as a part of an offeror's proposal are not, it is noted, considered as having been submitted prior to the closing date for the receipt of initial proposals. AM Multigraphics, B-196735, January 8, 1980, 80-1 CPD 23. Also, whereas Diesel states that in an October 6 telephone conversation with Mr. Meisel, Diesel was told that the contract specialist had informed his section chief of the protest and had "noted his file" prior to the closing date for the receipt of initial proposals, the contracting officer states he was not informed of the protest prior to the deadline. Moreover, the contracting officer states that the agency's "file [does not] contain any notation or other memoranda to that effect."

Our Office has held on numerous occasions that a communication of a prospective or actual bidder need not contain any precise and prescribed words of protest to be characterized as a formal bid protest as long as the communication can be understood as lodging specific exceptions to the particular procurement procedure and thus can be reasonably understood to constitute a protest. See, for example, TM Systems, Inc., 56 Comp. Gen. 300 (1977), 77-1 CPD 61. While we have held that the mere expression of displeasure with the actions of an agency does not sufficiently establish the communication of a protest (see Comprehensive Health Services, Inc., 58 Comp. Gen. 658 (1979), 79-2 CPD 37), such a factual situation does not exist here. Assuming

even that the facts as stated by the agency are correct, Diesel, in addition to expressing its disapproval of the sole-source restriction, stated that it would submit a bid based upon supplying an alternate part notwithstanding the restriction. We believe that this advice was sufficient to establish the fact that Diesel was actually intending its advice given during this conversation to constitute a protest. See Gibson & Cushman Dredging Corporation, B-194902, February 12, 1980, 80-1 CPD 122. Accordingly, we find the Diesel protest to have been timely filed with the contracting agency. Further, the Diesel protest is timely as it was filed with our Office within 10 working days after the closing date for the receipt of initial proposals, at which time it became apparent that the agency would take no action as regards the Diesel protest; thus, the closing date constituted the date of initial adverse agency action on the protest. See 4 C.F.R. § 21.2(a) (1981).

Diesel argues that the sole-source restriction is improperly restrictive of competition in this case primarily because the Army's needs may allegedly be described without reference to the sole-source part. Using the Morse part number and the Morse commercial parts book, one can determine that the part has a 3-inch "Travel" and is 175 inches long; and using the drawing listed in the solicitation, one may easily determine the paint color needed. Further, Diesel contends, military specification MIL-C-62191 (Control Assembly, Push-Pull) (March 25, 1974), which was prepared by TARCOM, contains all other necessary specifications and test requirements for the assembly being procured here. Diesel also notes that the Defense Construction Supply Center has used this military specification to acquire assemblies similar to those in question here and that on Diesel contract No. DLA700-80-C-3670 with that agency, first article testing took only 30 days and cost only \$60.

As a final thought, Diesel maintains that because the Department of the Army transmitted its report on the protest to our Office on January 13, 1981, or beyond the 25-day goal set forth in section 21.3(c) of our Bid Protest Procedures (4 C.F.R. Part 21) (1981), the agency report should be ignored as not timely submitted to our Office.

With respect to the Diesel contention that the agency report (and the facts employed therein to refute the Diesel protest allegations) should be ignored, we cannot agree. We have found that a delay in the submission of the agency report beyond the 25-day period is a purely procedural matter and does not provide a basis to disregard the report and its contents. Serv-Air, Inc., 57 Comp. Gen. 827 (1978), 78-2 CPD 223.

We also believe the agency has justified the use of the sole-source restriction in this procurement. The contracting agency solicited the procurement on a sole-source basis because the agency states it does not have adequate drawings and technical data to purchase the assembly on a competitive basis. Performance, durability, reliability, and environmental requirements for the assembly would have to be established and drawings would have to be developed before a competitive procurement could be issued. To conduct a competitive procurement without these, the agency notes, would constitute an unacceptable technical risk inasmuch as the performance of the part is safety related--the assembly is used to regulate the engine speed and, consequently, the winch on the M123A1C tractor upon which it is to be installed. Any monetary savings which might result from a competitive purchase would be irrelevant if the purchased part did not meet the Government's needs. The agency states that to make drawings for the part suitable for a competitive procurement would take about 11 months at an estimated cost of \$13,500; to develop performance, durability, reliability, and environmental criteria would require about 6-7 months. The agency also noted that the M123A1C tractor is currently being replaced with the M916 and M920 series of tractors, and, therefore, it is not anticipated that the Morse assembly will be procured again.

Regarding the alternate part offered by Diesel and the military specification which Diesel maintains should govern this procurement, the agency states that while the physical dimensions of the Morse part and the Diesel alternate part are similar, there are some dimensional differences between them. The possible effect of these differences is unknown. Consequently, only a trial installation of the Diesel alternate part could, in the view of the agency, permit a verification of the

physical adaptability of that part. Further, however, in order to be able to conduct such a verification, it would still be necessary to develop the necessary performance, durability, reliability, and environmental criteria so that the alternate part could be compared against these criteria. These must still be developed notwithstanding the military specification since that specification, contrary to the Diesel contention, does not adequately address the above four criteria for the part being procured in this instance. Indeed, it is provided in paragraph 3.3 of the specification that design requirements specified on military drawings (which do not exist for this part) are to take precedence over any requirements in the military specification. And Table I of the military specification, wherein are listed the various stock numbers which are governed by the specification, does not contain a listing of the stock number (2590-00-241-8504) for the Morse part.

Further indications of the inadequacy and inapplicability of the military specification to this procurement, we are advised, may be found in paragraph 6.1 of the specification where the control cable of the assembly is addressed as being mounted on the dash or on the control panel. The agency considers this to indicate that the specification is concerned with an internally mounted cable. Consequently, since the control cable of the Morse assembly is to be externally mounted, the testing and performance portions of the specifications are not appropriate in all necessary respects.

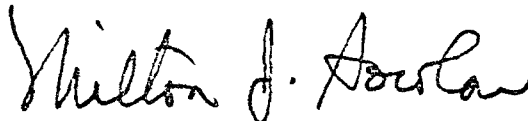
As concerns the cited Diesel contract, the agency notes that the contract was for an item whose application was as an "Emergency Engine Stop" and which was a "lock type." The application and the type of the Morse part are not the same as the item supplied by Diesel under that contract. Therefore, the fact that the Defense Construction Supply Center used the military specification for that item has no application to the Morse part.

Where the needs of the Government can only be satisfied by a single source, the Government is not required to compromise those needs in order to obtain competition. Julian A. McDermott Corporation, B-191468,

September 21, 1978, 78-2 CPD 214. Generally, in determining the propriety of a sole-source procurement, the standard to be applied is one of reasonableness; unless it is shown by the protester that the contracting agency acted without a reasonable basis, our Office will not question the procurement. Pioneer Parachute Co., Inc., B-190798, B-191007, June 13, 1978, 78-1 CPD 431.

The agency maintains that it does not possess enough data to procure the assembly in question on a competitive basis; that Diesel's alternate part is not now known to be an acceptable substitute; and that the cited military specification is inadequate as a basis for a competitive procurement. Based on our review of the record, as noted above, we cannot conclude that Diesel has shown that these agency positions are erroneous. Moreover, given the need for a "trial installation" of Diesel's alternate part and the time estimate (6-7 months) for developing the performance, durability, reliability, and environmental criteria which would be needed to test the complete acceptability of the alternate part, we do not object to the proposed sole-source award.

The protest is denied.



Acting Comptroller General
of the United States